



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 19 2009

**Jan Witold Baran, Esquire
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006**

**RE: MUR 6077
U.S. Chamber of Commerce**

Dear Mr. Baran:

On September 30, 2008, the Federal Election Commission notified your client, the U.S. Chamber of Commerce, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On May 6, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe your client violated the Act in connection with the alleged coordinated communications and reporting violations in this matter. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

**Mark Allen
Assistant General Counsel**

**Enclosure
Factual and Legal Analysis**

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT: U.S. Chamber of Commerce**

MUR 6077

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8 **I. GENERATION OF MATTER**

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10 This matter was generated by a Complaint filed with the Federal Election Commission by
11 the Minnesota Democratic-Farmer-Labor Party, through its Chairman, Brian Melendez. See
12 2 U.S.C. § 437g(a)(1).

13 **II. FACTUAL SUMMARY**

14 The Complaint alleges that the U.S. Chamber of Commerce ("the Chamber" or
15 "Respondent") and Jeff Larson coordinated communications with Norm Coleman ("Coleman"),
16 Coleman for Senate '08 ("CFS") and Rodney A. Axtell, in his official capacity as treasurer, and
17 thereby made prohibited corporate in-kind contributions in the form of the Chamber's three
18 television advertisements. The Complaint bases its allegation on an asserted "close knit web of
19 relations" between the identified persons, and an asserted common vendor relationship between
20 the Chamber and Coleman/CFS through Jeff Larson and his company FLS Connect.

21 The Chamber produced and aired three television ads in Minnesota prior to the 2008 U.S.
22 Senate election that focused on the positions of Coleman's opponent, Democratic Senate
23 candidate Al Franken, on the Employee Free Choice Act and tax increases, and on Coleman's
24 achievements as a Senator on health care, respectively. The television ads aired on August 8,
25 August 28, and September 4, 2008, prior to Minnesota's primary election on September 9, 2008.
26 The Chamber acknowledges that these television ads were paid for and aired by the Chamber on
27 Minnesota television stations. See Chamber Response at 4. For the two Chamber ads that aired

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1 less than 30 days before the primary election, the Chamber disclosed its payments of
2 \$199,463.00 and \$349,967.00 for the electioneering communications. See 2 U.S.C. § 434(f).

3 The available information suggests that Coleman and CFS were not aware of the
4 advertisements produced by the Chamber prior to their airing, and that the Chamber did not
5 consult with Coleman or CFS regarding its advertisements prior to their release. Respondent
6 emphasizes in its Response that FLS Connect did not perform any work on the Chamber ads at
7 issue in this Complaint.

8 Accordingly, the Commission finds no reason to believe that the Chamber violated
9 provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") by making
10 prohibited corporate in-kind contributions in the form of coordinated communications.

11 **III. ANALYSIS**

12 Under the Act, corporate contributions, including in-kind contributions, to a federal
13 candidate and his authorized political committee are prohibited, and candidates and their
14 authorized committees are prohibited from knowingly accepting such contributions. 2 U.S.C.
15 § 441b(a). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person
16 "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
17 authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i).

18 A communication is coordinated with a candidate, an authorized committee, or agent
19 thereof if it meets a three-part test: (1) payment for the communication by a third party; (2)
20 satisfaction of one of four "content" standards; and (3) satisfaction of one of six "conduct"
21 standards. 11 C.F.R. § 109.21.

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A. Payment

In this matter, the first prong of the coordinated communication test is satisfied as to the Chamber's ads because the Chamber acknowledges having paid for the ads in question. 11 C.F.R. § 109.21(a)(1); see Chamber Response at 4.

B. Content

The content prong is satisfied where the communication at issue meets one of the following content standards: an electioneering communication; a public communication that republishes, disseminates, or distributes candidate campaign materials; a public communication containing express advocacy; or a public communication that refers to a clearly identified federal candidate that was publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified federal candidate. 11 C.F.R. § 109.21(c)(1) - (4).¹

The public communications portion of the content standard appears to be satisfied as to the Chamber's television ads because all of the advertisements clearly identify either Coleman or Franken, who were each candidates in the 2008 U.S. Senate election in Minnesota, and because the ads were broadcast within 90 days of the September 9, 2008, primary as well as the

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. F.E.C.*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. June 13, 2008). The activity at issue in this matter occurred after the July 10, 2006, effective date of the revisions to Section 109.21.

November 4, 2008, general election within the State of Minnesota.² See 11 C.F.R.

§ 109.21(c)(4)(i).

C. Conduct

The six conduct standards of the coordinated communication test include situations in which the communication is created, produced, or distributed 1) at the request or suggestion of the candidate, his committee, or an agent thereof; 2) with the material involvement of the candidate, the committee, or agent; 3) after a substantial discussion with the candidate, committee, or agent; 4) by a common vendor; 5) by a former employee or independent contractor; or 6) via republication of campaign material. 11 C.F.R. § 109.21(d).

The Complaint alleges that the advertisements at issue “may also meet the third prong” of the test, stating that the “close-knit web of relations between Senator Coleman, the Chamber, ... Jeff Larson, and FLS-Connect ... taken together, support the inference that the advertisements were produced at the request of Senator Coleman or his agent, with Senator Coleman’s material involvement, or after substantial discussion with Senator Coleman or his agent.” Complaint at 4-5; see 11 C.F.R. § 109.21(d). Available information indicates that Larson and Coleman have many connections, including 1) Larson’s service as a long-time advisor for Senator Coleman, 2) Larson’s service as the treasurer of Coleman’s Northstar Leadership PAC, and 3) Coleman’s employment of Larson’s wife in one of his local constituent offices in Minnesota. The Complaint alleges that Coleman, CFS, and the Chamber have all been clients of Larson’s firm, FLS Connect, and that the coordination took place through Larson as Coleman’s agent. See Complaint at 5. The Complaint further cites this business relationship to support an allegation of

² Although we do not need to analyze whether the Chamber’s two television ads in question also meet the “electioneering communication” content standard, the Chamber disclosed its payments for the ads as electioneering communications. See FEC Form 9 filed by U.S. Chamber of Commerce, dated September 9, 2008.

1 coordinated communications through FLS Connect as a common vendor. *Id.* The available
2 information does not support the Complaint's allegations.

3 Addressing complainant's last allegation first, a vendor is a "common vendor" for the
4 purposes of the Act only if the same vendor creates or distributes the ad alleged to be
5 coordinated and, within 120 days, has provided specified services for the candidate alleged to
6 have benefitted from the coordination. *See* 11 C.F.R. § 109.21(d)(4). The available information
7 does not indicate that Jeff Larson contracted for, or otherwise participated in, the creation,
8 production, or distribution of the Chamber's advertisements related to the 2008 Minnesota
9 Senate campaign, or otherwise acted as a coordinator for these communications. More broadly,
10 the Chamber denies that FLS Connect did any work for the Chamber during the 2008 election
11 cycle other than membership drive telemarketing, and affirms that another firm created the ads in
12 question. *See* Chamber Response at 2 and 10.

13 To fulfill the common vendor standard of the conduct prong, it is not sufficient for the
14 entities involved to have merely hired the same commercial vendor for different work at various
15 points in the past. Instead, the common vendor must be performing work for the candidate or the
16 candidate's committee within 120 days of creating, producing, or distributing the specific
17 communication(s) alleged to have been coordinated, *see* 11 C.F.R. § 109.21(d)(4)(ii). Thus, the
18 available information indicates that FLS Connect is not a common vendor for the purposes of the
19 Act.

20 In response to the Complaint's inference that the advertisements were produced at the
21 request of Senator Coleman or his agent, with Senator Coleman's material involvement, or after
22 substantial discussion with Senator Coleman or his agent, Respondent denies any involvement
23 by, or coordination with, CFS or any agent thereof in the creation or distribution of the ads, and

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1 denies using Jeff Larson or FLS Connect in any way in the preparation and dissemination of
2 these ads. See 11 C.F.R. § 109.21(d)(1)-(3); Chamber Response at 10.

3 There is no other support offered for the Complaint's allegation as to the coordinating
4 conduct. Unwarranted legal conclusions from asserted facts, or mere speculation, will not be
5 accepted as true, and "[s]uch speculative charges, especially when accompanied by direct
6 refutation, do not form an adequate basis to find reason to believe that a violation of FECA has
7 occurred." Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for U.S. Senate
8 Exploratory Committee), issued December 21, 2000 (citations omitted). Here, Complainant's
9 inferences are convincingly refuted by the available information, including the response of the
10 Chamber, which denies any coordinating activity. The conduct prong of the coordinated
11 communications test does not appear to be fulfilled in this matter, and so the Chamber's
12 communications do not appear to have been coordinated with Coleman or CFS. Accordingly,
13 the U.S. Chamber of Commerce does not appear to have made prohibited in-kind contributions.
14 See 2 U.S.C. § 441b(a).

15 For the reasons set forth above, the Commission finds no reason to believe that the U.S.
16 Chamber of Commerce violated the Act in connection with the alleged coordinated
17 communications.

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